Petitioned — 18-233 Affirmed.
Judge Davis —
Judge Bradley & Court.
Submitted Nov 25 75.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 577.

THE CHICAGO CITY RAILWAY COMPANY, APPELLANT,

vs.

HENRY R. ALLERTON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 18, 1873.

Oct T 1873.

SUPREME COURT OF THE UNITED STATES.

No. 577.

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1 Pleas in the circuit court of the United States for the northern district of Illinois, sitting in chancery at the United States court-rooms in the city of Chicago, in the district aforesaid, before the Hon. Henry W. Blodgett, district judge of said district, on Thursday, the second day of October, in the year of our Lord one thousand eight hundred and seventy-three, and of our Independence the ninety-eighth year.

WILLIAM H. BRADLEY, *Clerk.*

HENRY R. ALLERTON
vs.
THE CHICAGO CITY RAILWAY COMPANY. } In chancery.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that, on the 7th day of July, A. D. 1873, said above-entitled complainant, by his solicitors, filed in the office of the
2 clerk of said circuit court of the United States for said northern district of Illinois, at Chicago, in said district, his bond for costs and his bill of complaint in said entitled cause; which said bond and bill are, respectively, in words and figures following, to wit:

Bond for costs.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court, July term, A. D. 1873.

HENRY R. ALLERTON
vs.
THE CHICAGO CITY RAILWAY COMPANY. } In chancery.

We enter ourselves security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court, and, in default of payment by the plaintiff, any costs ordered or adjudged to be paid by him, hereby agree and stipulate that execution may issue against our property for any costs taxed against him.

Dated this 7th day of July, A. D. 1873.

STORRS & JAMESON,
Compl'ts Sol'rs.

(Endorsed:) Filed July 7th, A. D. 1873. W'm H. Bradley, clerk.

3 *Bill of complaint.*

Seventh circuit, northern district of Illinois, ss:

To the judges of the circuit court of the United States for the seventh circuit & northern district of Illinois, in chancery sitting:

Henry R. Allerton, of New York, and a citizen of the State of New York, brings this bill against "The Chicago City Railway Company," a citizen of the State of Illinois. And thereupon your orator complains and says that, heretofore, to wit, under an act of the general assembly of the State of Illinois, approved February 14, 1859, Franklin Par-

melee, Liberty Bigelow, Henry Fuller, and David A. Gage, and their successors, were created and constituted a body corporate and politic by the name of "The Chicago City Railway Company." That in and by said act of incorporation the said corporation was authorised and empowered to construct, maintain, and operate a single or double track railway, with all necessary and convenient tracks for turn-outs, side-tracks, and appendages, in the city of Chicago, and in, over, and along such street or streets, highway or highways, bridge or bridges,
4 river or rivers, within the then present or future limits of the south or west divisions of the city of Chicago, as the common council of said city had then authorised said corporation, or any of them, or should authorise said corporation to do.

That the said defendant was duly and regularly organised under the same act of incorporation, and proceeded thereunder in the prosecution of the said business contemplated in & provided for by the said charter.

That under this third section of the said act of incorporation it was provided that the capital stock of the said company should be one hundred thousand dollars, but might be increased from time to time at the pleasure of said corporation, and that said capital stock has accordingly been increased until, on the 30th day of June, A. D. 1873, the said capital stock of the said defendant corporation amounted to the sum of one million two hundred and fifty thousand dollars.

That on the said 30th day of June, A. D. 1873, this complainant was, for a long time previous thereto had been, and now is, the owner of five hundred shares of the capital stock of said defendant corporation, from which he has derived remunerative dividends, and which is
5 of the actual value of at least fifty thousand dollars.

And your orator further shows that, on the 1 day of July, A. D. 1873, at a meeting of the officers & directors of said defendant corporation, the following resolution was passed and adopted and entered upon the records of said company:

"*Resolved*, That the capital stock of the Chicago City Railway Company be, on the first day of July, A. D. 1873, increased from $1,250,000 to $1,500,000.

Resolved further, That Messrs. Allerton, Crosby, & Phelps be appointed a committee to report to this board a plan for the equitable distribution of such increased stock to the stockholders of the company."

And your orator further shows that the said defendant, acting through its board of directors as aforesaid, are about to proceed to effect said increase of the capital stock of said defendant, and distribute the same in pursuance of said resolution.

And your orator further shows that the said resolution of the said board of directors of the said defendant is in contravention of section 13, article 11, of the constitution, and that the said defendant pos-sessed and had no right, legal power, or authority to increase
6 the capital stock of said defendant. That by said section of said article it is provided as follows: "No railroad corporation shall issue any stock or bonds, except for money, labor, or property actually received and applied to the purposes for which such corporation was created, & all stock-dividends & other fictitious increase of the capital stock or indebtedness of any such corporation shall be void. The capital stock of no railroad corporation shall be increased for any purpose,

except upon giving 60 days' public notice in such manner as shall be provided by law."

And your orator further shows that by an act of the general assembly of the State of Illinois, approved March 26, 1872, provision was made among other things to execute and carry out the said section of the constitution of the State of Illinois, hereinbefore quoted, as upon reference to the said act of the said general assembly will more fully and at large appear.

And your orator further shows that no notice of the said, nor of any meeting of the said stockholders of said company for the purpose of increasing the capital stock of said company was given or published,
7 as required by the said section of the constitution and the act of the general assembly of the State of Illinois, approved March 26, 1872, hereinbefore referred to.

And your orator further shows that the said proposed increase of the capital stock of the said seriously impairs and depreciates the value of the stock now held by him, as hereinbefore stated and set forth; that the said defendant has no legal right to increase its said capital stock as sought by the said resolutions of the said board of directors, as hereinbefore set forth. And your orator prays that by an injunction issuing out of and under the seal of this honorable court, the said defendant may be restrained from so doing, & that a decree may be entered restraining any increase of capital stock by said defendant under said resolution.

And your orator prays that process of subpœna may issue out of and under the seal of this honorable court, directed to the said defendant, The Chicago City Railway Company, commanding it by a certain day therein named to appear & answer this, your orator's bill of complaint. And that your orator may have such other and further relief as shall be agreeable to equity and good conscience.

And your orator will ever pray.

HENRY R. ALLERTON,
By STORRS & JAMIESON,
His Solicitors.

STORRS & JAMIESON,
Solicitors.
EMON A. STORRS,
Counsel.

8 (Endorsed:) Filed July 7th, 1873. W'm H. Bradley, cl'k.

9 Afterwards, to wit, on the 5th day of August, A. D. 1873, said defendant, by its solicitors, filed in said clerk's office its answer in said entitled cause, which said answer is in words and figures following, to wit:

Answer.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court of the United States for the northern district of Illinois.

HENRY R. ALLERTON
vs.
THE CHICAGO CITY RAILWAY COMPANY. } In chancery.

The answer of the Chicago City Railway Company, the defendant, to the bill of complaint of Henry R. Allerton, the above-named complainant.

This defendant, now and at all times hereafter saving to itself all and all manner of benefit of exception or otherwise that can or may be had or taken to the many errors, uncertainties, and imperfections in
10 the said bill contained, for answer thereto, or to so much thereof as this defendant is advised it is material or necessary for it to make answer to, answering, says:

That it was organized and is now doing business under a grant of rights, powers, and franchises from the State of Illinois, made on the fourteenth day of February, A. D. 1859, which said grant is in the words and figures following, viz:

An act to promote the construction of horse-railways in the city of Chicago.

SECTION 1. *Be it enacted by the people of the State of Illinois represented in the general assembly,* That Franklin Parmelee, Liberty Bigelow, Henry Fuller, and David A. Gage, and their successors, be and they are hereby created and constituted a body corporate and politic by the name of "The Chicago City Railway Company," for the term of twenty-five years, with all the powers and authorities incident to corporations for the purposes hereinafter mentioned.

SEC. 2. The said corporation is hereby authorized and empowered to construct, maintain, and operate a single or double track railway, with all necessary and convenient tracks for turnouts, side-tracks, and appendages in the city of Chicago, and in, on, over, and along such street or streets, highway or highways, bridge or bridges, river or rivers,
11 within the present or future limits of the south or west divisions of the city of Chicago as the common council of said city have authorized said corporators, or any of them, or shall authorize said corporation so to do, in such manner and upon such terms and conditions, and with such rights and privileges, as the said common council has or may, by contract with said parties, or any or either of them, prescribe, but said corporation shall not be liable for the loss of any baggage carried on said railways kept in and under the care of its owner, his servant or agent.

SEC. 3. The capital stock of said corporation shall be one hundred thousand dollars, and may be increased from time to time at the pleasure of said corporation. It shall be divided into shares of one hundred dollars each, and be issued and transferred in such manner and upon such conditions as the board of directors of said corporation may direct.

SEC. 4. All the corporate powers of said corporation shall be vested in and exercised by a board of directors, and such officers and agents as said board shall appoint. The first board of directors shall
12 consist of said Franklin Parmelee, Liberty Bigelow, Henry Fuller, and David A. Gage, and thereafter of not less than three nor more than seven stockholders, who shall be chosen each and every year by the stockholders at such time and in such manner as the said corporation shall by its laws prescribe. The said directors shall hold their offices until their successors are elected and qualified, and may fill any vacancies which may happen in the board of directors by death, resignation, or otherwise. They may also adopt such by-laws, rules, and regulations for the government of said corporation, and the management of its affairs and business, as they may think proper, not inconsistent with the laws of this State.

SEC. 5. The said corporation is hereby authorized to extend the said

several railways herein authorized to be built, in the manner aforesaid, to any point or points within the county of Cook, in this State; and, to enable said corporation to construct any or all the railways herein authorized or their appendages, the said corporation is hereby vested with power to take and apply private property for the purposes and in the manner prescribed by an act entitled "An act to amend the law condemning right of way for purposes of internal improvement," approved June 22, 1852, and the several acts amendatory thereof, and may exercise all the powers conferred upon railroad corporations
13 by the twenty-fifth and twenty-sixth sections of "An act to provide for a general system of railroad incorporations," approved November 5, 1849, ascertaining and making recompense for all damages sustained, agreeably to the provisions of the act hereinbefore first mentioned.

SEC. 6. The said corporation is hereby authorized, with the assent of the supervisor of any township, to lay down and maintain its said railway or railways in, upon, over, and along any common highway in said township, but in such manner as not to obstruct the common travel of the public over the same. In all cases where vehicles shall meet the cars or carriages of said railways, either in the city or country, said vehicles shall give way to the cars or carriages on the railway.

SEC. 7. All the rights and privileges granted or intended so to be to said Franklin Parmelee, Liberty Bigelow, Henry Fuller, and their associates, in and by the ordinances of the common council, and the amendments thereto, are hereby in all things affirmed, and shall pass to and become vested in the corporation hereby created.

SEC. 8. Nothing herein contained shall authorize the construction of more than a single track, with the necessary turnouts, which shall only be at street crossings upon State street between Madison and Twelfth streets, except by the consent of the owners of two-thirds of the
14 property, in lineal measurement, lying upon said State street, between Madison and Twelfth streets aforesaid, nor shall anything herein contained be construed to authorize the company hereby incorporated to permit the cars of any other railroad company whatever, propelled by steam, to run along or upon the railway of the company hereby incorporated.

SEC. 9. The said company hereby incoroporated shall, within two years from the passage of this act, erect, maintain, and operate two railroads, one from Lake street to the southern boundary of the city, and one from the south branch of the Chicago River, on Madison street, to the western boundary of said city; and upon failure to do so, this act, and all the privileges and franchises hereby conferred, shall cease and determine.

SEC. 10. All the grants, powers, privileges, immunities, and franchises conferred upon, and all duties and obligations required of, Franklin Parmelee, Liberty Bigelow, Henry Fuller, and David A. Gage by this act, for the south and west divisions of the city of Chicago and the county of Cook, are hereby conferred upon and required of William B. Ogden, John B. Turner, Charles V. Dyer, James H. Rees, and Valentine C. Turner, by the name of "The North Chicago Railway Company," for the north division of said city and said county of Cook, as
15 fully and effectually, to all intents and purposes, as if they had been, by a separate act, incorporated with all of said grants, powers, privileges, immunities, and franchises conferred upon them, and all of said duties and obligations imposed upon them; and the said last-named corporation may take, hold, mortgage, and convey real estate.

SEC. 11. This act shall be deemed a public act, and noticed by all courts as such without pleading, and shall take effect from its passage. Approved February 14, 1859.

This defendant, further answering, says that said charter was duly accepted by the corporation therein named, during the said month of February, A. D. 1859, and the capital stock of said corporation, as fixed by said act, to wit, one hundred thousand dollars was duly subscribed and paid into its treasury by said corporators and their associates.

That, afterwards, on the twenty-third day of May, A. D. 1859, this defendant entered into a contract with the city of Chicago to construct certain lines of railway upon several streets of said city, and to operate cars thereon for the carriage of passengers, and in pursuance of said contract did construct said line of railway, and are now operating the same.

This defendant, further answering, says that from time to time, as the streets of said city have been extended, and improved, and occu-
16 pied by residents, this defendant has, by like contracts with said city, extended said lines of railway, and constructed others at great expense, applying not only its original capital stock, but also the entire net receipts of said company for many years thereto, and issuing new stock to pay the remaining portion of the costs thereof.

That by the terms of said contracts this defendant is entitled to receive five cents for each passenger carried, and no more.

This defendant, further answering, says that, by reason of the rapid growth of said city, and the extension from time to time of its lines of railway, and the appreciation of its real estate, the value of its property and franchises has greatly increased, and now exceeds the nominal capital stock by at least the sum of two hundred and fifty thousand dollars.

This defendant further says that the right to increase its capital stock from time to time at its pleasure, and to issue the same in such manner and upon such conditions as its board of directors may determine, expressly granted and secured by the third section of its charter, is and always has been of great pecuniary value to this defendant.

This defendant further says that the thirteenth section of the eleventh article of the constitution of the State of Illinois, in said bill set
17 forth, if applied to this defendant, will, in its direct effect and to a large extent, impair and decrease the market value of the capital stock of this defendant, and it is advised by counsel that said provision of the said constitution is as against its said charter null and void.

This defendant further says that the market value of said stock is at the present time sixty per cent. above par.

This defendant, further answering, says that it is advised by counsel that said section of the constitution of this State does not apply to corporations organized to operate railways by horse-power upon the streets of towns and cities.

And this defendant denies all manner of unlawful combination and confederacy wherewith he is by the said bill charged, without this, that there is any other matter, cause, or thing in the said complainant's bill of complaint contained, material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied, is true to the knowledge or belief of this defendant; all of which matters and things this defendant is ready and willing to aver, maintain, and prove as this

honorable court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

M. D. HENNESSY,
Pres. Chicago City Railway Comp'y.

HITCHCOCK, DUPEE & EVARTS,
Solicitors for Def't.

18 (Endorsed:) Filed Aug. 5, 1873. W'm H. Bradley, cl'k.

Afterwards, to wit, on the second day of October, in the year of our Lord 1873, in the record of the proceedings of said court in chancery, in said entitled cause appears the following entry, to wit:

Decree.

HENRY R. ALLERTON
vs.
THE CHICAGO CITY RAILWAY COMPANY. } In chancery.

This cause came on to be heard, and bill and answer filed therein, and was argued by counsel, and thereupon, in consideration thereof, it was ordered, adjudged and decreed as follows: That the said respondent, The Chicago City Railway Company, has no legal right, power, or authority, by the resolutions of its board of directors, in the manner set
19 forth in the bill of complaint filed herein, to increase the capital stock of said company. That the said respondent, the said The Chicago City Railway Company, be, and it hereby is, perpetually restrained and enjoined from increasing the capital stock in the manner set forth in said bill of complaint.

That the prayer of the said complainant in said bill of complaint be granted, and that said complainant recover against the said respondent his costs in this suit to be taxed, and that execution issue therefor.

And thereupon the respondent prays an appeal to the Supreme Court.

20 Afterward, to wit, on the 6th day of October, A. D. 1873, said defendant, by its attorneys, filed in said clerk's office its appeal-bond in said entitled cause, which said bond is in the words and figures following, to wit:

Appeal-bond.

Circuit court of the United States for the northern district of Illinois.

HENRY R. ALLERTON
vs.
THE CHICAGO CITY RAILWAY COMPANY. } In chancery.

Know all men by these presents that we, The Chicago City Railway Company and John F. Johnson, are held and firmly bound unto Henry R. Allerton in the sum of two thousand dollars, to be paid to the said Henry R. Allerton, his executors or administrators, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, administrators, and suc-
21 cessors firmly by these presents, sealed with our seals, dated this second day of October, A. D. 1873.

Whereas the above-named The Chicago City Railway Company hath taken an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled action by the circuit court of the United States for the northern district of Illinois:

Now, therefore, the condition of this obligation is such that if the above-named The Chicago City Railway Company shall prosecute its said appeal to effect, and answer all costs if it shall fail to make good its plea, then this obligation to be void; otherwise to remain in full force and virtue.

[CORPORATE SEAL.] THE CHICAGO CITY RAILWAY COMPANY.
By M. D. HENNESSEY, *President.* [SEAL.]
JOHN F. JOHNSON. [SEAL.]

Approved:

H. W. BLODGETT, *Judge.*

(Endorsed:) Filed Oct. 6th, 1873. W'm H. Bradley, clerk.

22 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said district, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in said entitled cause, wherein Henry Allerton is complainant and The Chicago City Railway is defendant, as appears from the records of said court remaining in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court at my office in the city of Chicago, in said district, this sixth day of October, A. D. 1873, and of our Independence the ninety-eighth year.

[SEAL.] W'M H. BRADLEY, *Clerk.*

(Indorsed on cover:) No. 577. The Chicago City Railway Company, appellant, vs. Henry R. Allerton. N. Illinois. C. C. U. S. Filed 18th October, 1873.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1873.

THE CHICAGO CITY RAILWAY COMPANY,
Appellant,

vs.

HENRY R. ALLERTON,
Appellee.

Appeal from the Northern District of Illinois.

STATEMENT OF THE CASE—ALLEGATIONS OF ERROR IN THE DECREE—AND ARGUMENT FOR APPELLANT.

CHARLES HITCHCOCK,
Counsel for Appellant.

CHICAGO:
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1873.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A.D. 1873.

THE CHICAGO CITY RAILWAY COMPANY,
Appellant,
vs.
HENRY R. ALLERTON,
Appellee.

From the Northern District of Illinois.

STATEMENT OF THE CASE—ALLEGATIONS OF ERROR IN THE DECREE—AND ARGUMENT FOR APPELLANT.

MAY IT PLEASE THE COURT:

I.

The following statement of the case presents the questions involved, and the manner in which they arise, as concisely as possible:

The case was heard in the court below upon bill and answer, and the following facts are admitted by the pleadings:

The Chicago City Railway Company was organized under an act of the General Assembly of Illinois, approved Feb. 14, 1859 (vide Record, page 4).

This act, so far as it is material to the decision of this case, is as follows:

"SEC. 2. The said corporation is hereby authorized "and empowered to construct, maintain and operate a "single or double track railway, with all necessary and "convenient tracks for turn-outs, side-tracks and append-"ages in the city of Chicago, and in, on, over and along "such street or streets, highway or highways, bridge or "bridges, river or rivers, within the present or future "limits of the south or west divisions of the city of "Chicago, as the Common Council of said city have "authorized said corporators, or any of them, or shall "authorize said corporation so to do, in such manner "and upon such terms and conditions, and with such "rights and privileges, as the said Common Council has "or may, by contract with said parties, or any or either "of them, prescribe. * * * * * *

"SEC. 3. The capital stock of said corporation shall "be one hundred thousand dollars, and may be increased "from time to time, at the pleasure of said corporation. "It shall be divided into shares of one hundred dollars "each, and be issued and transferred in such manner and "upon such conditions as the Board of Directors of said "corporation may direct.

"SEC. 4. All the corporate powers of said corpor-"ation shall be vested in and exercised by a board of

"directors, and such officers and agents as said board "shall appoint. * * * * * *

"SEC. 5. The said corporation is hereby authorized "to extend the said several railways herein authorized to "be built, in the manner aforesaid, to any point or points "within the county of Cook, in this State, and to enable "said corporation to construct any or all the railways "herein authorized, or their appendages, the said corpo- "ration is hereby vested with power to take and apply "private property for the purposes, and in the manner "prescribed by an act entitled 'An act to amend the law "condemning right of way for purposes of internal "improvement,' approved June 22, 1852, and the several "acts amendatory thereof, and may exercise all the powers "conferred upon railroad corporations by the twenty- "fifth and twenty-sixth sections of 'An act to provide for "a general system of railroad incorporations,' approved "November 5, 1849, ascertaining and making recom- "pense for all damages sustained, agreeably to the pro- "visions of the act hereinbefore first mentioned.

"SEC. 6. The said corporation is hereby authorized, "with the assent of the supervisors of any township, "to lay down and maintain its said railway or railways, "in, upon, over, and along any common highway in said "township, but in such manner as not to obstruct the "common travel of the public over the same." * * *

The corporation has, from time to time, under various contracts with the city of Chicago, constructed certain lines of railway, applying to that purpose its original

capital stock—its net earnings for many years, and issuing new stock to pay the remaining portion of the cost thereof.

These contracts limit the rate of fare to five cents for each passenger carried.

By reason of the rapid growth of the city, the extension, from time to time, of its lines of railway, and the appreciation of its real estate, the value of its property and franchises has greatly increased, and now exceeds, by at least $250,000, its present nominal capital stock, which is worth and sells in the market at sixty per cent. above par.

The answer alleges that the right to increase its capital stock at pleasure, is of great pecuniary value to the corporation, and that the deprivation of that right would, in its direct effect, and to a large extent, impair and decrease the market value thereof. (Rec., p. 6.)

On the 1st day of July, 1873, at a regular meeting of the Board of Directors, the following resolution was passed and entered upon the records of the company:

"*Resolved*, That the capital stock of the Chicago City "Railway Company be, on the first day of July, A. D. "1873, increased from $1,250,000 to $1,500,000.

"*Resolved, further*, That Messrs. Allerton, Crosby, and "Phelps be appointed a committee to report to this "board, a plan for the equitable distribution of such "increased stock, to the stockholders of the company." (Record, p. 2.)

Thereupon the complainant filed the bill in this case to restrain the issue of new stock under said resolution.

The bill alleges that the proposed issue is in contravention of the 13th section of Art. 11 of the Constitution of Illinois, and of an act of the General Assembly of that State approved March 26th, 1872, and designed to carry into effect the aforesaid provision of the Constitution. Article 11 of the Constitution, so far as material in this case, is as follows:

"SEC. 9. Every railroad corporation organized or "doing business in this State, under the laws or authority "thereof, shall have and maintain a public office or place "in this State for the transaction of its business, where "transfers of stock shall be made, and in which shall be "kept, for public inspection, books, in which shall be "recorded the amount of capital stock subscribed and by "whom; the names of the owners of its stock, and the "amounts owned by them respectively; the amount of "stock paid in and by whom; the transfers of said stock; "the amount of its assets and liabilities, and the names "and place of residence of its officers. The directors "of every railroad corporation shall annually make a "report, under oath, to the auditor of public accounts, "or some officer to be designated by law, of all their acts "and doings, which report shall include such matters "relating to railroads as may be prescribed by law. And "the General Assembly shall pass laws enforcing by "suitable penalties the provision of this section.

"SEC. 10. The rolling stock, and all other movable "property belonging to any railroad company or corpo-

"ration in this State, shall be considered personal prop-
"erty, and shall be liable to execution and sale in the
"same manner as the personal property of individuals,
"and the General Assembly shall pass no law exempting
"any such property from execution and sale.

"SEC. 11. No railroad corporation shall consolidate
"its stock, property or franchises, with any other railroad
"corporation owning a parallel or competing line, and
"in no case shall any consolidation take place except
"upon public notice given, of at least sixty days, to all
"stockholders in such manner as may be provided by
"law. A majority of the directors of any railroad cor-
"poration, now incorporated or hereafter to be incorpora-
"ted by the laws of this State, shall be citizens and residents
"of this State.

"SEC. 12. Railways heretofore constructed or that may
"hereafter be constructed in this State, are hereby
"declared public highways, and shall be free to all
"persons, for the transportation of their persons and
"property thereon, under such regulations as may be
"prescribed by law. And the General Assembly shall
"from time to time, pass laws establishing reasonable
"maximum rates of charges for the transportation of
"passengers and freight on the different railroads in this
"State.

"SEC. 13. No railroad corporation shall issue any
"stock or bonds, except for money, labor or property
"actually received and applied to the purposes for which
"such corporation was created; and all stock dividends,
"and other fictitious increase of the capital stock or

"indebtedness of any such corporation, shall be void. "The capital stock of no railroad corporation shall be "increased for any purpose, except upon giving sixty "days' public notice, in such manner as may be provided "by law."

The Act of Assembly, so far as material, is as follows:

"SEC. 1. Be it enacted by the People of the State of "Illinois, represented in the General Assembly, That "whenever the board of directors, managers or trustees "of any corporation existing by virtue of any general or "special law of this State, or any corporation hereafter "organized by virtue of any law of this State, may desire "to change the name, to change the place of business, to "increase or decrease the capital stock, to increase or "decrease the number of directors, managers or trustees, "or to consolidate said corporation with any other cor- "poration now existing, or which may hereafter be "organized, they may call a special meeting of the stock- "holders of such corporation, for the purpose of submit- "ting to a vote of such stockholders, the question of such "change of name, change of place of business, increase "or decrease of number of directors, managers or trus- "tees, increase or decrease of capital stock, or consolida- "tion with some other corporation, as the case may be.

* * * * * * *

"SEC. 3. At any such meeting, stockholders may vote "in person or by proxy, each stockholder being entitled "to one vote for each share of stock held by him; and "votes representing two-thirds of all the stock of the "corporation shall be necessary for the adoption of the

"proposed change of name, place of business, number "of directors, managers or trustees, amount of capital "stock, or consolidation with some other company.

"SEC. 4. If at any regular annual meeting, or at the "time and place specified in said notice of a special meet- "ing called for that purpose, said propositions, or any of "them, be submitted to a vote; and if it shall appear "that two-thirds of all the voters represented by the "whole stock of such corporation are in favor of the "propositions, or of any of them, so submitted, a certificate "thereof, verified by the affidavit of the president, and "under seal of said corporation, shall be filed in the "office of the Secretary of State, and a like certificate "filed for record in the office of the recorder of deeds of "the county where the principal business office of such "corporation is located. And upon the filing of said cer- "tificate, the changes proposed and voted for at such "meeting, as to name, place of business, increase or "decrease of capital stock, or number of directors, man- "agers or trustees, or consolidation with some other com- "pany, shall be, and is hereby declared, accomplished in "accordance with said vote of the stockholders. *And* "*provided further, That any corporation other than corpora-* "*tions for manufacturing purposes, availing itself of, or* "*accepting the benefits of, or formed under this act (except the* "*mere change of name), shall be subject to the general laws* "*of this State now in force, or which may hereafter be passed,* "*regulating corporations of like character.*"

The application and validity of these provisions of law are the only questions in the case, and they arise upon the facts admitted by the pleadings.

II.

ALLEGATIONS OF ERROR IN THE DECREE.

First. The court below erred in finding that the foregoing provisions contained in the 13th Section of the 11th Art. of the Constitution of Illinois, and in the act of March 26, 1872, were applicable to the Chicago City Railway Company.

Second. If said provisions are applicable to the Chicago City Railway Company, then the court erred in finding that they were valid.

In support of these allegations of error, I submit the following

BRIEF AND ARGUMENT.

I.

The 13th Section of the 11th Art. of the Constitution of Illinois does not apply to corporations organized to operate street railways for the mere carriage of passengers at a fixed rate.

a. The context of the 13th section shows that the convention which framed the Constitution and the people who adopted it were dealing with questions concerning railways for the carriage of freight as well as passengers, and operated by steam, and with lines extending through the State.

The section relates to one phase of the "railway prob-

lem" as it is understood in the politics of the day. It no more affects city railways than omnibus lines.

The ninth section of the article under discussion provides that every railroad corporation shall maintain a public office in the State and shall keep books at that place for the transfer of stock and registers of capital and owners of stock, the amount of its assets and liabilities, etc. It provides for reports from its officers, etc. It was obviously framed to enable the legislature of the State to acquire power and jurisdiction over that class of railway corporations whose officers, offices and books were located in New York city or other places out of the State. The general words "railroad corporation" are evidently restricted in meaning to their common acceptation.

The 10th section provides that the rolling stock of railroad corporations shall be considered personal property, and that no law shall be passed exempting it from sale or execution. This provision was evidently intended to reverse the Supreme Court of the State in its decision of the case of Palmer *v.* Forbes, 23 Ills., p. 301, a decision applicable only to the engines, steam tenders and cars of railroads. It probably has never been maintained that the cars of a horse railway company running upon a public street in which the company has not even an exclusive right of way except for its special carriages could be considered real estate. It is inconceivable that the provision was aimed at the horses, harnesses and carriages of street railways.

The 11th section prohibits consolidation of parallel or competing lines, and provides that a majority of directors

of any railroad corporation shall be citizens and residents of the State.

This provision obviously relates to "railroads" as the term is commonly understood.

The first clause of the 12th section declares that "railways are public highways, and shall be free to all persons for the transportation of their persons and *property* under such regulations as may be prescribed by law."

This declaration is mere nonsense as applied to a street railway. If it has any meaning at all it is obviously limited to the great lines operated by steam through the State.

The second clause of the 12th section, which immediately precedes the section presented in this case for construction, provides that "the General Assembly may from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on the different railroads in the State."

This clause in terms does not refer to railways carrying passengers only at rate fixed by contract.

Then follows the section relied upon by complainant as a prohibition on the Chicago City Railway Company. It is as follows:

"SEC. 13. No railroad corporation shall issue any stock "or bonds, except for money, labor, or property actually "received and applied to the purposes for which such cor- "poration was created; and all stock dividends and other "fictitious increase of the capital stock or indebtedness

"of any such corporation, shall be void. The capital "stock of no railroad corporation shall be increased for "any purpose, except upon giving sixty days' public notice "in such manner as may be provided by law."

b. The case of street railways carrying for a fare fixed by law or contracts is not within the mischief designed to be remedied by the section in question. The only evil of increasing the nominal stock of a corporation in Illinois, so far as the debates in the convention and before the people disclose, is in the temptation and pretext thereby furnished to increase the rates of transportation so as to pay dividends on the increased stock. Now, this evil cannot exist in a case where the fare is fixed by contract and cannot be increased as is the case with the Chicago City Railway Company.

c. The debates in the convention may be of little moment in giving construction to the section in question, yet it is proper to say that a careful examination of them has been made and no reference can be found to other than "railroads" in the common meaning of the term.

d. It appears by the statement of the "case" that the stock which it is proposed to issue is in no sense fictitious.

The Chicago City Railway Company was organized in 1859, with a capital of one hundred thousand dollars. It was an experiment in Chicago. Its charter provided for the construction from time to time of new lines upon any of the streets of the city. It has constructed a net-work of such lines, applying its earnings and the proceeds of new and increased stock thereto. Its capital stock now is one

million two hundred and fifty thousand dollars, and it is worth sixty per cent. above par. This increase in value arises from the application of its earnings, the appreciation of its real estate, the extension of its lines, and the growing importance of its franchises.

II.

If the 13th Section of the 11th Art. can be applied to the Chicago City Railway Company, it is void as impairing the obligation of a contract.

The charter contains the following provision with reference to the increase of stock:

"SEC. 3. The capital stock of said corporation shall "be one hundred thousand dollars, and may be increased "from time to time at the pleasure of said corporation. "It shall be divided into shares of one hundred dollars "each, and be issued and transferred in such manner "and upon such conditions as the board of directors of "said corporation may direct."

The corporate powers are by the 4th section vested in the Board of Directors.

The pleadings admit that the right to issue new stock as its lines of railway, its property and franchies increase, is of great pecuniary value to the corporation and that its property, including its franchises, are worth more than the par of its stock when it shall be increased as proposed. It is admitted that the company, from time to time, has been and still is extending its lines and acquiring

rights upon new streets, and has been and is using a considerable portion of its earnings in constructing such lines.

Upon this state of facts the following authorities are pertinent and decisive of the law of the case.

The Binghamton Bridge, 3 Wallace, 51.

The People *v.* The J. & M. P. R. Co., 9 Michigan, 307.

Chicago *v.* Sheldon, 9 Wallace, 50.

Planters' Bank *v.* Sharp, 6 Howard, 301.

The People *v.* The Manhattan Company, 9 Wendell, 353.

State *v.* Noyes, 47 Maine, 189.

Trustees of Dartmouth College *v.* Woodward, 4 Wheaton, p. 518.

Respectfully submitted.

CHARLES HITCHCOCK,
Counsel for Appellant.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1873.

THE CHICAGO CITY RAILWAY COMPANY,
Appellant,
vs.
HENRY R. ALLERTON,
Appellee.

Appeal from the Northern District of Illinois.

REPLY FOR APPELLANT,

BY

CHARLES HITCHCOCK.

CHICAGO:
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Appeal from the Northern District of Illinois.

REPLY FOR APPELLANT.

MAY IT PLEASE THE COURT:

In answer to the argument of the appellee, I respectfully submit the following reply.

It is substantially conceded that the proposed increase of stock by the Chicago City Railway Company is in no just or proper sense fictitious. The special character and value of the franchises and property of the corporation are such as to leave no doubt upon this point. I understand it to be practically admitted also that the right to

increase the capital stock "at the pleasure of the corporation" is a substantial one, of which the appellant can not be divested by legislation. It is, however, argued—

1st. That Sec. 13 of Art. 11 of the Constitution, and the act passed to give effect thereto, only changed the method of ascertaining the pleasure of the corporation. It is said that although by the charter the question is to be determined by the Board of Directors, who are the agents of the corporate body, yet by the law the question is to be determined by the stockholders or the corporate body itself. If such were the *fact*, the Chicago City Railway Co. would cheerfully submit to the law. If the *right* was substantially undisturbed, and the mode of increase only changed, no controversy would exist in this case, and the corporation would remove all doubt as to the validity of the increase, by conformity to the requirements of the statute. But in fact the statute does not leave the pleasure of the corporation to be determined by a majority of the stockholders. It requires the assent of two-thirds in amount of all the stock of all the corporate members. Now this provision is a substantial deprivation of right. A majority of shares of the stockholders may elect a Board of Directors, who may under the charter issue the stock. To provide that two-thirds shall be requisite to do that which a majority might do under the charter, is as substantial a change as was made in the method of electing trustees in the Dartmouth College case.

The question is one of power on the part of the legis-

lature. If it may require the assent of two-thirds of the stockholders to an increase, when the charter vests the power in the agents of a majority, it may require the assent of nine-tenths, or even unanimity.

That it may appear that I am not mistaken in this view, the language of the act is copied. It is as follows: "If it shall appear that two-thirds of all the votes represented of the whole stock of such corporation are in favor of the propositions or of any of them, then a certificate verified by the affidavit of the president and under the seal of the corporation, shall be filed in the office of the Secretary of State, and thereupon the changes proposed as to increase or decrease of capital stock shall be declared accomplished."

Act March 26th, 1872.

There is, however, a more serious objection on the part of the appellant to conforming to the statute than is found in the mere fact that it requires a vote of two-thirds of the stockholders to authorize an increase of the stock. This objection is to be found in the provisi[illegible] to the 4th section of the act.

It is as follows: "*And provided further*, that any corpo-
"ration other than corporations for manufacturing pur-
"poses, availing itself of, or accepting the benefits of, or
"formed under this act (except the mere change of name)
"shall be subject to the general laws of this State now in
"force, or which may hereafter be passed, regulating cor-
"porations of like character."

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"ration other than corporations for manufacturing pur-
"poses, availing itself of, or accepting the benefits of, or
"formed under this act (except the mere change of name)
"shall be subject to the general laws of this State now in
"force, or which may hereafter be passed, regulating cor-
"porations of like character."

This proviso clearly discloses a purpose to compel corporations to submit to any general laws of the State under the pretense of regulating the manner in which they shall exercise their powers.

If the Chicago City Railway Company shall increase its stock by a vote of two-thirds of its stockholders as provided by the act, instead of by resolution of the directors as provided by the charter, and shall advertise and file the certificate in pursuance of the act, it will be evident that it is acting under, and availing itself of the act, and there is great danger that it might be held to have so far accepted it as to become subject to the general laws of the State. The appellant cannot be compelled to enter into a bargain with the State to surrender its franchises whenever the State may choose to call upon all other street railways by general law to make a similar surrender.

It has been repeatedly held in analagous cases that acting under a statute is such a sanction or acceptance of it as to preclude a party from showing that it was unconstitutional.

In the case of *Van Hook* v. *Whitlock*, 26 Wendell, 43, such effect was given to the receipt of a dividend under an unconstitutional law although the party was entitled to a larger sum than he received.

In the case of the *People* v. *Murray*, 5 Hill, 468, parties who had acted under a statute by building a dam were held to be not at liberty to question the constitutionality of the provision relating to the mode of assessing the damages.

There is analogy also in the rule that a party by accepting a dividend under a State insolvent law is estopped from denying the validity of the law authorizing the discharge of the debtor upon the ground of territorial immunity.

Clay v. *Smith*, 3 Pet., 411.
Phillips v. *Allan*, 8 B. & C., 477.

In the case of *Burlington* v. *Gilbert*, 31 Ia., 356, it was held that a party who had signed a petition for a local improvement could not object to the legality of the assessment made to pay the cost thereof.

COOLEY, in his work on Constitutional Limitations, p. 181, says: "There are cases where a law in its application to a particular case must be sustained because the party who makes objection has by prior action precluded himself from being heard against it. Where a constitutional provision is designed for the protection solely of the property rights of the citizen it is competent for him to waive the protection and to consent to such action as would be invalid if taken against his will.

I cite these authorities only to show that there is good reason for the appellant to decline to act under the statute, because such action may be held evidence of its assent to the terms of it, including the provisos subjecting the corporation to any general law which may hereafter be passed.

It needs no argument to support the proposition, that a law imposing so severe a penalty as submission, notwith-

standing a charter, to any general act which may be hereafter framed, is a law impairing the obligation of a contract.

Respectfully submitted.

CHARLES HITCHCOCK,
Counsel for Appellant.

IN THE

SUPREME COURT

—OF THE—

UNITED STATES.

OCTOBER TERM, A. D. 1873.

HENRY R. ALLERTON,
Appellee,
—*adsm.*—
THE CHICAGO CITY RAILWAY CO.,
Appellant.

From the Northern District of Illinois.

Argument for Appellee,

—BY—

EMERY A. STORRS.

Inter-Ocean (Beach & Barnard) Print, 119 Lake Street, Chicago.

IN THE

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October Term, A. D. 1873.

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—adsm.—
THE CHICAGO CITY RAILWAY CO.,
Appellant.

From the Northern District of Illinois.

ARGUMENT FOR APPELLEE.

MAY IT PLEASE THE COURT:

The complainant in the bill filed in this cause, seeks to restrain the defendant, acting through its board of directors, from increasing the capital stock of the company from $1,250.000 to $1,500,000.

The complainant is a stockholder, and avers that such increase will depreciate the value of the stock now held and owned by him, amounting to five hundred shares.

The complainant denies the right of the board to increase the capital stock of the defendant, on the ground that such increase in the manner contemplated is forbidden by Sec. 13, Art. 11, Constitution, 1870, as well as by the act of the General Assembly, approved March 1, 1872. (Statutes 1871-2, p. 68.)

The Section of the Constitution referred to is as follows:

"No Railroad Corporation shall issue any stock or bonds, except for "money, labor, or property actually received and applied to the purposes "for which such corporation was created, and all stock dividends and

"other fictitious increase of the capital stock, or indebtedness of any "such corporation shall be void. *The capital stock of no Railroad Cor-* "*poration shall be increased for any purpose, except upon giving sixty days* "*public notice, in such manner as may be provided by law.*"

The 15th section of the act of General Assembly before referred to, provides among other things, for the increase of the capital stock of any Railroad Corporation, "by a vote in person or by proxy, of two-thirds "in amount of all the stock of such corporation at a meeting of such stock "holders, called by the directors of the corporation for such purpose, by "giving notice in writing to each stockholder * * * at least sixty "days prior to the day appointed for such meeting, and by advertising "the same in some newspaper published in each county, through or into "which the said road shall run or be intended to run (if any newspaper "shall be published therein) at least sixty days prior to the day appointed "for such meeting."

It is not claimed by the complainant that the proposed increase of stock is in any way fictitious, nor is it pretended by the defendant that any such notice has been given as is required by the Constitution, and the statute passed in conformity thereto, and it is admitted that the proposed increase is to be made if at all, by the action of the *Board of Directors*.

That such action is in direct contravention of the section of the Constitution, and the statute quoted, can admit of no doubt.

The only questions made therefore are:

1st. Do the Constitution and the statute impair any rights of property vested in the defendant by its charter?

2d. Does the section of the Constitution referred to relate to Street Railways?

The defendant's charter is set forth at length in the answer.

By the *third* section of the charter, it is provided that "the capital "stock of said corporation shall be one hundred thousand dollars *and* "*may be increased from time to time at the pleasure of said corporation.*"

"The *fourth* section provides that all the corporate powers of said "corporation shall be vested in, and exercised by a board of directors, "and such officers and agents as said board shall appoint."

Referring to the board of directors the fourth section also provides that "they may also adopt such by-laws, rules and regulations for the "government of said corporation, and the management of its affairs and "business as they may think proper—*not inconsistent with the laws of* "*this State.*"

These are all the essential portions of the charter having any special reference to the question under discussion.

Now it will be observed, that the real substantial right granted by the legislature, and vested in the defendant by its charter, is from time to time to increase its capital stock "*at the pleasure of said corporation.*" For the purpose of this argument it may be conceded, that the right thus granted is a substantial one, of which the defendant cannot by any subsequent legislation be divested. But neither the Constitution nor the statute passed in aid of it, deprives the defendant of that right. It still leaves the right of the corporation to increase its capital stock at its pleasure entirely open. *It does nothing more than to change the manner in which such pleasure shall be ascertained.* Under the charter the pleasure of the corporation is determined by the Board of Directors. They, after all, are but the mere representatives of the stockholders—their mere agents. The Constitution and statute passed for the purpose of giving it effect, in substance, say:

"Now, as ever, your stock may be increased, if the corporation so "desire, but hereafter, the power to decide whether the corporation does

"other fictitious increase of the capital stock, or indebtedness of any "such corporation shall be void. *The capital stock of no Railroad Cor-* "*poration shall be increased for any purpose, except upon giving sixty days* "*public notice, in such manner as may be provided by law.*"

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"Now, as ever, your stock may be increased, if the corporation so "desire, but hereafter, the power to decide whether the corporation does

"in fact desire an increase of its capital stock, shall be taken from the "hands of the agents representing the stockholders, and placed directly "in the hands, and under the control of the stockholders, the princi- "pals themselves."

The right of the directors to increase the capital stock, exists at best only by implication, and under the 4th section providing that "all "the corporate powers of said corporation shall be vested in, and exer- "cised by a board of directors, and such officers and agents as the board "shall appoint."

The evil sought to be remedied by the clause of the Constitution upon which we rely, was to prevent the secret increase of the capital stock of such corporations through the action of the Board of Directors, without the knowledge of the stockholders, and to the substantial destruction of their interests.

This evil had assumed formidable proportions, and no practical relief could be furnished, save by an absoulte prohibition of such increase *in that manner*, and by remitting the whole question to its proper source—the voice of the stockholders speaking for themselves. It is in its nature a *police regulation*, designed to secure the rights and property of individuals, stockholders in railway corporations, against destruction by their agents; to protect them in the enjoyment of their rights of property against the frauds of those occupying positions of confidence and trust, but whose conduct in such positions, it is practically impossible for the stock-holders to supervise or control.

The question then, simply stated is this: "Has the legislature "the right to change the *methods* indicated in the charter of a railroad "corporation by which its capital stock shall be increased, and by which "the wishes of the stockholders as to such proposed increase shall be "ascertained?"

The charter of the defendant gives to its board of directors, the right to adopt such by-laws, rules, and regulations for the government of said corporation, and the management of its affairs, as they may deem proper, "*not inconsistent with the laws of this State.*"

This relates not to only the laws in existence at the time the charter was granted, but to such as might thereafter be enacted. It contemplated future action by the board of directors, and each by-law, rule or regulation, and the right to make, or adopt the same, would be tested by its consistency with the laws of the State, *then* in force.

The proposed increase of the capital stock of the defendant is in effect a "regulation" of the board of directors for the management of the affairs and business of the corporation. It is utterly opposed to and entirely inconsistent with the Constitution and laws of this state.

It is a well settled legal principle that statutes which affect *remedies* merely, are not repugnant to that clause of the Federal Constitution forbidding any State to pass any law impairing the obligation of contracts. Statutes regulating the limitation of actions, the manner in which, and the time when they may be commenced, no matter what the effect of such statutes may be upon existing rights, have been uniformly upheld. What difference can be pointed out in principle between such statutes and the one under discussion?

Nothing is changed save the *mode* in which the capital stock of these companies shall be increased. The *right* is the right to make such increase. That is left undisturbed.

This right the charter confers only at the *pleasure of the corporation*, and the statute changes merely the manner of ascertaining that fact. Withdraws the power of determining it from the hands of agents, and reposes it exclusively in the principals.

The right to increase the capital stock of the defendant *against the*

wish of the stockholders, and *contrary to their pleasure*, has never yet been conferred upon or vested in the defendant's board of directors.

The Constitution and the statute taken together, simply make it impossible that any such increase should be made, and so far from impairing any vested right, secures that substantial one granted to the stockholders by that clause of the third section which provides for an increase of the capital stock "from time to time *at the pleasure of said* "*corporation*."

Second. Do the 13th Section, Article 11th, Constitution, and the Act March 1, 1872, relate to Horse Railways?

There is certainly nothing in either, specific in character, to show that they do not.

The language of the Constitution is: "The capital stock of *no railroad corporation* shall be increased," &c.

It is not contended that the defendant is not a "railroad corpora-"tion."

The statute is entitled "an act to provide for the incorporation of "associations that may be organized for the purpose of constructing "*Railways*, maintaining and operating the same."

No distinction is made between railways whose tracks are laid in the streets of cities, and whose cars are drawn by horses, and those whose tracks are extended over great lengths of country, and whose cars are propelled by steam. Both are railroad corporations. Both are in their nature public corporations. The charter of the defendant assimilates it to railroads generally, by conferring upon it the benefits and privileges of the Acts of June 22, 1852, and the several Acts amendatory thereof, and also the "Act to provide for a general system of "railroad incorporations, approved November 5, 1849."

The character of the organization is in both cases the same. Both

are stock companies. The evils of watered stock are the same in a horse railroad as in a steam railroad company. The evils of a fraudulent increase of capital stock are the same in both cases. In short the *law* has made no distinction so far as the subject matter of this discussion is concerned between the two kinds of railroads. No reason has been pointed out why there should be any such distinction. There is every reason so far as the increase or issuance of capital stock is concerned, that they should stand precisely on the same footing, and the law having made no distinction, the Courts will make none.

Respectfully submitted,

EMERY A. STORRS,
Counsel for Appellees.

STORRS & JAMIESON, *Solicitors.*

Chicago, October 1, 1873.